RE TAN HWEE EARN, EX P THE PEOPLE'S INSURANCE COMPANY (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[BANKRUPTCY NO: D5-29-2355-1996]
10 MAY 1999

BANKRUPTCY: *Notice - Final judgment - Whether judgment in default was a final judgment - Section 3(1)(i) Bankruptcy Act 1967*

BANKRUPTCY: *Notice - Setting aside - Grounds for challenging notice - Section 3(1)(i) Bankruptcy Act and r. 95 Bankruptcy Rules 1969 - Whether must allude therein that debtor had a counterclaim, set off or cross demand*

BANKRUPTCY: *Creditor's petition - Service - Whether creditor's petition must be served together with the affidavit of truth of statements in the petition - Bankruptcy Act 1967, s. 6(1) - Bankruptcy Rules 1969, r. 109*

The judgment creditor obtained a judgment in default against the judgment debtor on 30 January 1996. Thereafter the judgment creditor filed a bankruptcy notice against the judgment debtor on 23 August 1996. The bankruptcy notice was served on the judgment debtor on 8 November 1996. The judgment debtor responded by filing a summons-in-chambers to set aside the bankruptcy notice on 15 November 1996. The judgment creditor then proceeded with the filing of a creditor's petition against the judgment debtor on 11 December 1996 and service of the same was effected on the judgment debtor on 17 December 1996. The judgment debtor then filed a summons-in-chambers to set aside the creditor's petition. Both applications were heard by the senior assistant registrar who dismissed the application to set aside the bankruptcy notice but allowed the application to set aside the creditor's petition. The judgment debtor appealed against the decision not to set aside the bankruptcy notice on the grounds, *inter alia*, that the judgment in default was not a final judgment and in any event, the judgment debtor had established the existence of a counterclaim or cross-demand which entitled him to have the bankruptcy notice set aside. The judgment creditor also appealed against the decision to set aside the creditor's petition.

Held:

[1] The judgment in default constituted a final judgment for the liquidated sum claimed by the judgment creditor against the judgment debtor. (*Adzmi Ali & Anor v. Mohamed Esa Kasad* foll).

[2] Although the affidavit supporting the summons-in-chambers filed by the judgment debtor was filed within the time frame provided under s. 3(1)(i) Bankruptcy Act 1967, it did not allude therein that the judgment debtor had a counterclaim, set off or cross-demand which would equal or exceed the amount of the judgment or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained and therefore had not complied with the requirements under s. 3(1)(i) and r. 95 Bankruptcy Rules 1969.

[3] As there was no statutory obligation on the part of the judgment creditor under s. 6(1) Bankruptcy Act 1967 read with r. 109 Bankruptcy Rules 1969 to serve the creditor's petition together with the affidavit of truth of statements in the petition, there could therefore be no violation of the provisions thereof.

[4] Because of the judgment debtor's failure to comply with the provisions of s. 3(1) and (2) Bankruptcy Act 1967 read with r. 95 Bankruptcy Rules 1969, it must be treated as if no application by way of affidavit had been made. The so-called application by way of summons-in-chambers was therefore a non-starter. Thus the creditor's petition was not premature.

[Judgment debtor's appeal dismissed and judgment creditor's appeal allowed.]

Case(s) referred to:

Adzmi Ali & Anor v. Mohamed Isa Kasad [1987] 1 CLJ 445 ***(foll)***
Datuk Lim Kheng Khim v. Malayan Banking Bhd [1993] 3 CLJ 324 ***(foll)***
Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 3 CLJ 1616 ***(refd)***
Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225 ***(refd)***
Re Dato' Othman Bokhari, ex p Diners Club (M) Sdn Bhd [1998] 4 CLJ 315 ***(foll)***
Re Haroun Al-Rashid Mohd Yusof, ex p Daya Leasing Sdn Bhd [1996] 2 CLJ 516 ***(refd)***
Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd [1994] 3 CLJ 377 ***(refd)***
Re Yap Kin, ex p United Malayan Banking Corp Bhd [1997] 3 CLJ Supp 56 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii), 6(1), 131
Bankruptcy Rules 1969, rr. 95, 106, 109, 117

For the judgment debtor - Azlan Sulaiman; M/s Ghazi & Lim
For the judgment creditor - CK Yeoh; M/s Othman Hashim & Co

Reported by Izzaty Izzuddin

JUDGMENT

Steve Shim J:

There are two appeals before me – one by the debtor against the decision of the learned senior assistant registrar in dismissing his application in encl. 14 to set aside the Bankruptcy Notice (BN) and the other by the creditor against the decision of the learned senior assistant registrar in allowing the debtor's application in encl. 11 to strike out or set aside the Creditors Petition (CP).

The background to these appeals can be briefly stated herein. On 30 January 1996, the creditor obtained a judgment in default against the debtor for the sum of RM1.5 million with interest at 8% p.a. from 1 October 1994 until full and final settlement. Pursuant thereto, the creditor initiated bankruptcy proceedings against the debtor by filing a request to issue Bankruptcy Notice and accordingly a Bankruptcy Notice was filed on 23 August 1996. On 8 November 1996, the said Bankruptcy Notice was served on the debtor. The debtor responded by filing a summons-in-chambers to set aside the BN on 15 November 1996 supported by an affidavit affirmed by the debtor on 14 November 1996. The creditor then filed a CP on 11 December 1996 together with the affidavit of truth of statements affirmed by one Song Knee Nyok on the same date. The CP was served on the debtor on 17 December 1996. Thereafter, the debtor filed an application to strike out and/or set aside the said CP *vide* a summons-in-chambers dated 3 April 1997 supported by an affidavit. The debtor also filed a Notice of Intention to Oppose Petition pursuant to r. 117 of the Bankruptcy Rules on 7 April 1997. These applications were opposed by the creditor who filed two affidavits in reply. The debtor then responded by filing two further affidavits in reply, one in respect of his intention to oppose the CP and the other in respect of his opposition to the BN. As I have said before, both the applications were heard by the learned senior assistant registrar who dismissed encl. 14 but allowed encl. 11. Hence the two appeals herein.

Let me begin with the debtor's appeal. Here, there was an application by the debtor to set aside the BN primarily on two grounds namely, (1) that the judgment was not a final judgment within the meaning of s. 3(1)(i) Bankruptcy Act 1967 upon which the creditor founded the BN and (2) that in any event, the debtor had established the existence of a counter-claim/cross demand under s. 3(1)(i) aforesaid which would entitle him to have the BN set aside.

In respect of the first ground, counsel for the debtor has submitted that the debtor had lodged an appeal against the default judgment dated 30 January 1996 and that it was not a final judgment because it was not a judgment on the merits or one which would finally dispose of the rights of the parties until the appeal to the Court of Appeal had been disposed of. In this connection, he has relied on the case of *Re Udos ak Riging, ex parte Seabanc Kredit Sdn Bhd* [1994] 3 CLJ 377; [1994] 3 MLJ 383 where the creditor obtained a default judgment against the debtor who then applied to have the judgment set aside. With respect, I think the Federal Court case of *Adzmi bin Ali & Anor v. Mohamed Isa bin Kasad* [1987] 1 CLJ 445; [1987] 2 MLJ 199 cited by counsel for creditor, is more in point. There, it was held that if the claim was for a debt or liquidated sum and the defendant defaulted in entering appearance, final judgment for the sum could be entered against him. Seah, SCJ said *inter alia*:

> Now, when a defendant fails to enter an appearance to a writ for an unliquidated sum, the plaintiff may enter interlocutory judgment against him for damages to be assessed (see O. 13 r. 2 of the Rules of the High Court 1980). *On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults in entering an appearance within the specific time, final judgment for the sum claimed may be entered against him (see O. 13 r. 1(1)).* The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order (see O. 13 r. 8). *In our opinion, the word 'judgment' in O. 13 r. 8 means a 'final' judgment under O. 13 r. 1(1)* or an 'interlocutory' judgment under O. 13 r. 2 thereof.

In my view, the parts underscored above are particularly significant to the present case because the creditor's claim against the debtor was for a liquidated amount and the debtor had defaulted in failing to appear in court to counter the said claim in Civil Suit No. D5-22-145-1995. In such a situation, applying the dictum of the Federal Court in *Mohamed Isa bin Kasad, supra*, the judgment in default would constitute a final judgment for the sum claimed by the creditor against the debtor in this case. In the circumstances, I must hold that the first ground relied on by the debtor has no merit.

As regards the second ground advanced by the debtor that he had established satisfactorily the existence of a counter-claim or cross demand against the creditor under s. 3(1)(i) Bankruptcy Act which would entitle him to have the BN set aside, he has drawn the court's attention to a Civil Suit No. S2-22-480-1996 brought by him against the creditor, the particulars of claim are more specifically stated in cl. 4.1 of his affidavit affirmed on 25 June 1998 which reads:

> Melalui Mahkamah Tinggi Kuala Lumpur Guaman No. S5-22-480-1996 (Guaman Sivil 5), saya menuntut dari Pemiutang sejumlah wang sebanyak RM1,633,064.30 berserta faedah pada 8% setahun dan 30.6.1994 hingga penyelesaian, iaitu satu jumlah yang jelas melebihi jumlah yang dihakimkan pada 30.1.1996 terhadap saya dalam Mahkamah Tinggi Kuala Lumpur Guaman Sivil D5-22-145-1995 (Guaman Dagang 5) dan juga jelas melebihi jumlah yang dituntut oleh Pemiutang melalui Notis Kebankrapan bertarikh 23.8.1996 (Notis Kebankrapan tersebut).

In rebuttal, counsel for the creditor has raised a procedural point contending, in effect, that the debtor could not rely on his affidavit affirmed on 25 June 1998 for non-compliance with s. 3(1)(i) Bankruptcy Act and r. 95 Bankruptcy Rules. The application of the said section and rule has been adequately explained by Abdul Hamid JC (as he then was) in *Malayan Banking Bhd v. Datuk Lim Kheng Khim* [1992] 3 CLJ 1616; [1992] 2 MLJ 540 when he said:

> The law as I understand it is, if a judgment debtor intends to satisfy the court that there is a counter-claim set-off or cross demand, we must file an affidavit within seven days of the service of the bankruptcy notice on him – S. 3(1)(i) and r. 95. Similarly, if he intends to dispute the sum stated in the bankruptcy notice as the amount due, he has to give notice to that effect (usually by affidavit), also within seven days – S. 3(2) proviso (ii) and r. 95. If he intends to object to the bankruptcy notice on other grounds, then he has to do it by way of motion and the seven-day period is not applicable.

In the instant case, although the affidavit supporting the summons-in-chambers filed by the debtor was filed within the time frame provided under s. 3(1)(i), it did not however allude therein that the debtor had a counter-claim, set-off or cross demand which equal or exceed the amount of the judgment or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained and therefore had not complied with the requirement under the said s. 3(1)(i) and with r. 95. The allusion to the existence of a counter-claim, set-off or cross demand was only deposed to in the debtor's subsequent affidavit, filed on or about 25 June 1998, well beyond the time frame allowed for under s. 3(1)(i) and hence, again, there was non-compliance of the same. In the circumstances, on the authority of the Supreme Court in *Datuk Lim Kheng Khim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 MLJ 298, it must be treated as if no affidavit had been filed for the purpose of this application.

Now, it would seem that the debtor, in filing the summons-in-chambers at encl. 14 together with the supporting affidavit had, in effect, disputed the sum stated in the BN by deposing (1) that the debtor had a defence on the merits and (2) that the interest of 8% p.a. imposed on the judgment was wrong in law. If it was intended to rely on s. 3(2) proviso (ii) Bankruptcy Act, there would still be a need to give seven clays notice (see *Malayan Banking Bhd v. Datuk Lim Kheng Khim, supra*). There is no indication that the debtor had done so.

For the reasons stated, I am of the view that the second ground advanced by the debtor holds no water and I reject it accordingly. In the circumstances, having also rejected the first ground raised by the debtor, the only conclusion which can be reached is that there is no merit in the application at encl. 14. I therefore uphold the decision of the learned senior assistant registrar and dismiss this appeal with cost.

I come now to the creditor's appeal, which, as I have said, is against the decision of the learned senior assistant registrar in allowing the debtor's application in encl. 11 to strike out or set aside the Creditors Petition (CP). There are essentially three grounds raised by the debtor in encl. 11.

The first ground relates to the allegation that the CP was wrongly entitled. More specifically it has been alleged that the title to the CP should be "Petisyen Sipiutang" and not "Permohonan Sipiutang". The short answer to this is that the Malay version of the Rules *ie*, "Kaedah-Kaedah Kebankrapan" published by the International Law Book Services has used the term "Permohonan Sipiutang" in such a petition. In any event, I do not think it makes much difference whether the term "Petisyen Sipiutang" or the term "Permohonan Sipiutang" is used. They mean the same thing for the purpose of the CP. Perhaps because of this, counsel for the debtor has not taken issue of it in this appeal.

In propagating the second ground, the debtor has alleged that the CP was not served together with the affidavit verifying the contents of the said CP thereby contravening the provisions of s. 6(1) of the Bankruptcy Act 1967, which stipulates:

> A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.

According to counsel for the debtor, the words "and shall be served as prescribed" refer to both the petition and the affidavit. He has also relied on the authority of *Re Haroun Al-Rashid bin Mohd Yusof, ex p Daya Leasing Sdn Bhd* [1996] 2 CLJ 516; [1996] 5 MLJ 317 in which the creditor was alleged to have failed to serve the verifying affidavit with the creditor's petition. It was held that s. 6(1) Bankruptcy Act and r. 106 Bankruptcy Rules were mandatory and therefore the failure to serve the affidavit verifying the petition on the judgment debtor could not be taken as mere irregularity that could be cured. There was also reliance on *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 2 MLJ 526.

In response to the above contention, counsel for the creditor submits that the court in *Re Haroun Al-Rashid* had wrongly applied *Ooi Thean Chuan* which merely decided the issue of whether the petition had to be attached to or tied to or bound to the verifying affidavit when the petition was filed and the court there held that the verifying affidavit prescribed by r. 106 was Form 11 which required the said petition to be so annexed to or bound to or attached to or joined to or affixed to or stapled to the verifying affidavit so as to avoid any dispute as to what was being verified and failure to do so, would make the petition irregular and not curable by s. 131 Bankruptcy Act. He went on to submit that since the issue to be decided in *Re Haroun Al-Rashid* was whether it was essential to serve the petition together with the verifying affidavit, the principle enunciated in *Ooi Thean Chuan* had no application to the present case. Counsel contends that the correct statement of the law was laid down in *Re Yap Kin, ex p United Malayan Banking Corp Bhd* [1997] 3 CLJ Supp 56; [1996] 5 MLJ 355. He also relies on *Re Dato' Othman Bokhari, Ex p Diners Club (M) Sdn Bhd* [1998] 4 CLJ 315. In *Re Yap Kin,* it was held *obiter* that it was not necessary to serve the verifying affidavit together with the petition since r. 109 of the Rules did not mention the need to do so. And in *Re Dato' Othman Bokhari*, it was held that there was no requirement under the Bankruptcy Act or the Bankruptcy Rules that the verifying affidavit needed to be served and that the only document required to be served under s. 6(1) of the Act was the petition.

Now, I think the wordings in s. 6(1) are sufficiently clear and precise. It simply means that a creditor's petition has to be verified by affidavit of the creditor and has also to be served as prescribed. And the relevant provision for service is prescribed under r. 109 which stipulates:

> A creditor's petition shall be personally served and service shall be effected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

In construing s. 6(1) Bankruptcy Act, I am inclined to accept the position taken in *Re Yap Kin* and *Re Dato' Othman Bokhari*. In the instant case, as there was no statutory obligation on the part of the creditor under s. 6(1) read with r. 109 to serve the CP together with the affidavit of truth of statements in the petition affirmed by Song Khee Nyok, there could therefore be no violation of the provisions thereof. In the circumstances and for the reasons stated, I find no merit in the second ground advanced by counsel for the debtor.

In canvassing the third ground, counsel for the debtor has submitted that the CP was premature. It is his contention that at the time the CP was presented, the debtor had already filed an application to set aside the BN within the seven day period prescribed by r. 95 Bankruptcy Rules and therefore no act of bankruptcy was deemed to have been committed under the notice until the

said application had been heard and determined. This point was indirectly raised by counsel for the debtor in his appeal earlier. Therein, I held that because of his failure to comply with the provisions of s. 3(1) and (2) of the Act read with r. 95 of the Rules, it must be treated as if no application by way of affidavit had been made. The so-called application by way of summons-in-chambers was therefore a non-starter. In the circumstances, I hold that the third ground has no merit whatsoever.

For the reasons stated, I must, with respect, disagree with the decision of the learned senior assistant registrar in allowing the debtor's application in encl. 11. Accordingly, I think it is fair and appropriate to allow the creditor's appeal with cost.